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90-334

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES N. STEPHENS,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Secretary,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BEVERLY B. BATES
(Counsel of Record)

BATES, BAUM & LANDEY
Suite 3500
101 Marietta Tower
Atlanta, Georgia 30303
(404) 681-2200
Counsel for Petitioner

August 20, 1990

Tower Printing Company, 2 Peachtree St., Atlanta, Georgia 30383, (404) 659-4080

QUESTIONS PRESENTED

I.

Whether the lower courts incorrectly barred on a jurisdictional basis petitioner's claims of constitutional, statutory and regulatory violations against his federal agency employer.

II.

Whether the lower courts erroneously approved the deprivation of petitioner's statutory veterans preference eligibility when he applied for the position of Regional Attorney and was denied any reason for his non-selection nor did the Office of General Counsel file any written reasons with the OPM or its own office justifying the veterans passover, both in direct contravention of 5 U.S.C. 3318 (b) (3).

III.

Whether the lower courts erroneously permitted the agency to withhold records relevant to petitioner's grievance that the selection process of the Office of General Counsel, Department of Health and Human Services, was flawed in its selection of a Regional Attorney.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, James N. Stephens, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled cause on May 23, 1990.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals is attached as Appendix A. The opinion of the district court for the Northern District of Georgia is attached as Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was filed on May 23, 1988. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254 (1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime
>
> * * *
>
> Nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 C.F.R. 771.201 This part sets forth the regulations under which each agency shall establish an agency administrative grievance system.

5 C.F.R. 771.202 "Grievance", except as provided in § 771.206 of this part, means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction relating to the employment of the employee(s) which is subject to the control of agency management.

5 C.F.R. 771.205 Except as provided in § 771.206 (c), this part applies to any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management, including any matter on which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her.

5 C.F.R. 771.206(c) Matters excluded (1) This part does not apply to:

(iii) Nonselection for promotion from a group of properly ranked and certified candidates or failure to receive a noncompetitive promotion.

5 U.S.C. § 552

(a) Each agency shall make available to the public information as follows:

* * *

(b) This section does not apply to matters that are—

* * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute unwarranted invasion of personal privacy:

* * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * *

STATEMENT OF THE CASE

(i) *Course of Proceedings and Disposition Below*

Petitioner (plaintiff and appellant below), a Schedule A federal employee, veteran, long time Deputy Regional Attorney for HHS Region IV, and Acting Regional Attorney, applied for appointment to the vacancy of Regional Attorney, Region IV (now Chief Counsel). Count I pleads errors in the handling of Plaintiff's administrative grievances, and errors in the failure to grant a veterans preference to Plaintiff in his consideration for the appointment (advertised on an unrestricted basis as an external appointment to all qualifying attorneys, whether or not presently federal employees and without geographical limitation); Count II pleads administrative due process violations; Count III pleads denial of equal protection by the agency's application of the veterans preference statute. Plaintiff sought relief in Count IV under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The records sought by Plaintiff consist of records of the Office of General Counsel, HHS, related to the "promotion file" for the position of Regional Attorney, Region IV. Count V pleads constitutional violation by the agency. The basis for the district court's juridiction was 28 U.S.C. § 1331, 28 U.S.C. § 1361, 5 U.S.C. § 552 5 U.S.C. § 701 et seq., the free speech clause of the First Amendment and the due process clause of the Fifth Amendment.

When the agency created a new position of Chief Counsel under the SES to replace the Regional Attorney position, Plaintiff sought to enjoin the selection of an appointee because he could not meet the stated requirements, not having served at the GS-15 level (only the Regional Attorney in Region IV, Atlanta, then served at the GS-15 level). Plaintiff's motion for injunctive relief was denied after a hearing by the Court. (R., Vol. II).

The District Court granted Defendant's Motion for Summary Judgment, as to Count IV and Defendant's Motion to Dismiss as to Counts I, II, III, and V. Plaintiff's Motion for Reconsideration was denied by order filed on April 20, 1989. Plaintiff filed a notice

of appeal and the Eleventh Circuit issued an opinion on May 23, 1990, affirming the District Court.

(ii) *Statement of the Facts*

Vacancy announcement 85-GCA-2 was issued by the Office of General Counsel, HHS, for the position of Regional Attorney, Region IV, with a closing date for applications of May 1, 1985. Plaintiff applied under the vacancy announcement for the position of Regional Attorney. His outstanding qualifications for the appointment are evident from his background (third ranking graduate at the Wake Forest Law School), eleven years as Deputy Regional Attorney, Acting Regional Attorney for seven months, and important special assignments during his twenty-one year career with the HHS Office of General Counsel. However, Plaintiff was advised of his non-selection by a telephone call from Acting General Counsel Coleman on or about August 13, 1985. The selection certificate originally issued on May 31, 1985, was limited to thirty (30) days. A selection was not made under the certificate until August 12, 1985, more than thirty (30) days beyond the issuance. The certificate was not extended. On August 14, 1985, in a subsequent telephone conversation Plaintiff was advised by Mr. Coleman that a consideration in favor of the selection of Mr. Granger was his being from outside the Atlanta Office.

Plaintiff filed a grievance with Mr. Coleman on September 11, 1985, under the HHS grievance procedure. Mr. Coleman's decision of October 8, 1985, rejected Plaintiff's grievance of September 11, 1985, on the ground that any grievance of a "Nonselection for promotion from a group of properly ranked and certified candidates" is excluded from the grievance coverage. By letter of October 8, 1985, Mr. Coleman refused to grant Plaintiff's request for a deferment of his decision pending Plaintiff's request for documents pertinent to the grievance under the Freedom of Information Act. Plaintiff filed a second grievance or amended grievance with General Counsel Robertson on October 25, 1985, alleging additional errors in the selection process, specifically that the selecting official: failed to properly rank and group candidates

for the position of Regional Attorney, Region IV; failed to choose the selectee from a list of properly certified candidates; improperly considered criteria outside the selection criteria in vacancy announcement 85-GCA-2; improperly used scoring matrices in violation of the HHS Merit Promotion Plan; improperly delegated to a subordinate of the selecting official the authority to rate candidates in violation of the HHS Merit Promotion Plan; and failed to give Plaintiff a veterans preference as required by law. The second grievance or amended grievance was rejected by Mr. Robertson's letter of November 19, 1985, concluding that the rejection of the initial grievance by Mr. Coleman was appropriate. Plaintiff formally grieved the November 19, 1985 decision of the second stage grievance officer, Mr. Robertson, on December 5, 1985 (insofar as his decision reached the merits of the second grievance) and Plaintiff asked for an investigation and hearing by a grievance examiner pursuant to the HHS formal grievance process. By letter of December 9, 1985, from Plaintiff's counsel to Mr. Robertson, Plaintiff requested written reasons for his pass over as a preference eligible veteran. By letter of December 24, 1985, from Mr. Robertson to Plaintiff's counsel, Mr. Robertson denied Plaintiff's request for written reasons. HHS Assistant Secretary for Management and Budget John J. O'Shaughnessy in his response of January 30, 1986, refused to consider the "second or amended grievance" of October 25, 1985 on the merits. Paul C. Johnson, III Director, Office of Human Relations, issued the "final decision of the Department" on February 26, 1986, denying Plaintiff's request for reconsideration, which had sought to review the Department's refusal to consider Plaintiff's grievance.

After Plaintiff's complaint was filed on August 26, 1986, HHS advertised by Vacancy Announcement 86-GCA-8 the new position of Chief Counsel, Region IV, Atlanta, Georgia, SES, on September 15, 1986. The former position of Chief Counsel, Region IV, Atlanta, Georgia, GS-15, was converted to the Senior Executive Service (SES). The SES Vacancy Announcement stated that candidates must have had experience as a GS-15 or equivalent. Plaintiff was a GM-14, equivalent paywise to a Senior Level GS-14. Although he applied for the position, the effect of

the Competitive Requirement as stated in the announcement was to preclude Plaintiff from consideration for the SES position. At the injunction hearing, the court requested the Assistant United States Attorney to determine if Plaintiff would be considered in light of the stated competitive requirement. After consultation with an agency personnel official, the Assistant United States Attorney advised the court that he would not meet the requirement (R. 2-56). (All later citations are to Vol 1.)

Plaintiff filed the subsequent complaint in the companion case of CA-8551 against the individual Defendants on August 10, 1987. Plaintiff was advised on August 14, 1987, by Mr. Granger, the selectee (now restyled as Chief Counsel of Region IV), that the Plaintiff's then current position of Deputy Chief Counsel was eliminated. The reason given for the elimination of the position by Chief Counsel Granger was that he no longer needed a deputy. However, shortly afterwards two (2) new positions were created to substitute for the eliminated position of Deputy Chief Counsel, and advertised on October 15, 1987. The functions of the eliminated Deputy Chief Counsel were absorbed into the two (2) new positions of Deputy Chief Counsel. Although Plaintiff applied for the new positions and although his background, experience and achievement were superior to the other applicants he was not chosen for either new position. One applicant who was chosen for one of the positions had little, if any, previous supervisory experience. The selections were announced on December 7, 1988, after which Plaintiff filed a timely motion to amend in CA-8551 asserting retaliation which was denied by the district court.

Although Plaintiff has also filed grievances with the agency as a result of these actions pointing to specific procedural and substantive deficiencies, the grievances have been summarily rejected without being considered on the merits, referred to a grievance official for investigation, or otherwise handled in accordance with regulatory requirements. Plaintiff's non-selection as Regional Attorney, the initial retaliatory action by Defendants, was caused by Plaintiff's refusal to criticize his superior. By opposing age discrimination directed against the then Regional

Attorney Carl H. Harper, who officials of Defendant sought to remove for his age, Plaintiff was excluded from further consideration as Mr. Harper's successor. The series of palpably retaliatory and prejudicial personnel decisions following his non-selection and the filing of this action depreciated Plaintiff's standing in the Office of General Counsel and among federal attorneys throughout the Atlanta area who knew Plaintiff when he was President of the Atlanta Chapter of the Federal Bar Association in 1972-1973. From having been the third ranking student in his class at Wake Forest Law School, recognized as the outstanding staff attorney in the Regional Attorney's office, recipient of the Outstanding Younger Federal Lawyer Award of the Atlanta Chapter of the Federal Bar Association in 1971, Deputy Regional Attorney for eleven years, and six months as Acting Regional Attorney, Plaintiff's overall professional standing has been blemished and stigmatized by the retaliatory actions set out in this complaint and amendment and in the complaint and rejected amendment in CA-8551.

I.

PLAINTIFF WAS IMPROPERLY DENIED JURISDICTIONAL ACCESS TO THE DISTRICT COURT

1. ADMINISTRATIVE PROCEDURE ACT JURISDICTION AND NO PREEMPTION BY CSRA.

The argument that the Civil Service Reform Act of 1978 (CSRA), Pub.L. 95-454, 92 Stat. 1111 *et seq.*, was intended by Congress to be the exclusive remedy for federal employees is not reasonable. There is no provision within the CSRA which states or implies that the statute is the exclusive remedy for federal employee relief. In addition, the argument for exclusivity is made wooden by the CSRA's lack of inclusive coverage for federal employee personnel actions. This lack of coverage in CSRA has been recognized by the Supreme Court. *Bush v. Lucas*, 462 U.S. 367, 110 S.Ct. 2404, 2415, fn.28, 76 L.Ed. 2d 648 (1983), states:

> Not all personnel actions are covered by this system. For example, there are no provisions for appeal of either suspensions for 14 days or less, 5 U.S.C. Section 7503 (1982 ed.), or adverse actions against probationary employees, Section 7511. In addition, certain actions by supervisors against federal employees, such as wiretapping, warrantless searches, or uncompensated takings, would not be defined as "personnel actions" within the statutory scheme.

Furthermore, the *Bush* majority opinion observed that federal employees are protected by an elaborate comprehensive scheme encompassing subtantive provisions. *Bush, supra,* 103 S.Ct. at 2415. The Supreme Court stated that the Veterans Preference Act of 1944 was among the most significant of those substantive protections. *Bush, supra,* 103 S.Ct. 2415, fn. 25. This statutory scheme, as indicated by *Bush,* incorporates more provisions and protection than that found solely in CSRA. It is conceded by Defendant that Plaintiff has exhausted his administrative remedies (Defendant's Response to Plaintiff's First Request for Admission, No. 4) (R. 14). The APA specifically declares that the reviewing court shall "interpret constitutional and statutory provisions: and "hold unlawful and set aside agency action" found to be "contrary to constitutional right . . ." and "in excess of statutory. . . authority, or limitation. . . ." 5 U.S.C. § 706.

It had been considered prior to CSRA that violation of statutory right in connection with a personnel decision could be enforced and reviewed under the APA. *See Kletschka v. Driver,* 411 F.2d 436 (2d Cir. 1969). Violation of regulatory rights granted to federal employees has long been considered reviewable. *See Vitarelli v. Seaton,* 359 U.S. 535, 79 S.Ct. 968, 31 L.Ed. 2d 1012 (1959). *See also Carducci v. Regan,* 714 F.2d 171 (D.C. Cir. 1983) at 174, fn.1. There is no statutory language in CSRA stating or implying a Congressional intent to make CSRA the exclusive remedy for the federal employees and to erase existing review under the APA. The Supreme Court stated in *Lindahl v. Office of*

Personnel Management, 470 U.S. 768, 105 S.Ct. 1620, 1627, 84 L.Ed.2d 674 (1985):

> We have often noted that "only upon showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." (Citing cases).

In *Lindahl, supra,* the Supreme Court construed language in a statute governing federal employee appeals of disability determination. The Supreme Court held that the CSRA did not bar review of alleged errors of law and procedure arising from the Merit Systems Protection Board (MSPB) judgment — only review of factual determinations were barred. In making its determination, the majority opinion noted a preexisting allowance of judicial review by case law in disability appeals for legal and procedural error, and determined that it was not discarded by a subsequent statute permitting a broader factual review applying only to involuntary mental disability requirements. *Lindahl, supra*, at 1628. The Court approvingly quoted prior authority:

> The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. *Lindahl, supra*, at 1628-1629.

The mere fact that CSRA established standards for review of certain personnel actions in a newly created MSPB, and authorized appeals in the Court of Claims or in the courts of appeals does not evince an intent by Congress to deny APA review in those cases for which no review was established under CSRA in the MSPB. *See Lindahl, supra*, at 1631. There is no intent to preempt other federal employee remedies articulated in the legislative history. The effect of the statute was to broaden federal employee protection on behalf of "whistleblowers" and to establish more objective standards for employee performance. While CSRA had an aim of improving the efficiency of the federal service, it evinced no intent to limit previously existing employee substantive rights in the area of statutory protection such as veterans preference or in the area of regulatory protection such as the hearing process established for

grievances. It would frustrate the reformative intent of CSRA to conclude that it precludes a review of the integrity of the administrative review process. Plaintiff seeks no review of the merits of his grievances but to require the agency to make a review on the merits; to follow its own ordained procedures.

A line of decisions in several circuits has rejected the proposition that CSRA provides an implied private right of action for violation of prohibited personnel practices identified in 5 U.S.C. § 2302(b). *See e.g. Schrachta v. Curtis*, 752 F.2d 1257 (7th Cir. 1985). However, to extend the analysis of these cases to argue that the CSRA preempts any previously existing right of action to the federal employee, except where specifically granted under CSRA, is a totally different proposition. *Dugan v. Ramsey*, 727 F.2d 192 (2nd Cir. 1984) strongly upholds Plaintiff's position:

> The government would imply, from the fact that Congress wished to unify much court review of MSPB decisions in the Federal Circuit, a congressional prohibition against court review of final personnel decisions that do not find their way to the MSPB. This conclusion, however, does not follow logically from the premise. It runs counter to the strong presumption in the law that favors reviewability and almost never implies statutory preclusions of review from congressional silence (at 194-195).

The legislative history contains no language suggesting that the purpose of CSRA, or one of its purposes, was to eliminate APA review or even to limit review in any respect. *Compare United States v. Erika*, 456 U.S. 201, 208, 102 S.Ct. 1650, 1654, 72 L.Ed. 2d 12 (1982). The presumption in favor of judicial review must prevail in this case. *Compare Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed. 2d 623 (1986) *with United States v. Erika, supra.*

Plaintiff relies upon more than the preexisting remedy for judicial relief and the presumptive right to judicial review. The legislative history of CSRA definitely states that violation of a

law, rule, or regulation may be made the basis of a *legal action* by an employee. House Conference Report No. 95-1717, 1978 U.S. Code & Cong. News 2861. The legislative history, then, evinces a desire to preserve existing legal actions. *Compare Sullivan v. Hudson*, __ U.S. __ , 109 S. Ct. 2248, 2260, __ L.Ed. 2d __ (1989) (dissent of Justice White).

The CSRA preemption line of cases, even if correct, are inapplicable to Plaintiff for he had a remedy specified under CSRA, a grievance, to contest the personnal action. Plaintiff was entitled to file a grievance under regulation, 5 C.F.R. 771.201 *et seq.*; and the agency grievance system, HHS Instruction 771-3. Among other grounds, he could contest the ranking of the candidates for the vacancy and challenge whether the certificate of appointment was validly issued in view of the expiration of the certificate containing the list of certified candidates. *See* 5 C.F.R. 771.206 for the provision incorrectly relied upon by the Acting General Counsel to reject Plaintiff's grievance.

Plaintiff has shown violations of the grievance process and in effect denial of a hearing by Defendant's arbitrary refusal to grant deferment of the administrative decision on the initial grievance pending receipt of FOIA materials; by improperly rejecting the grievance on the specious ground that it was excluded from the grievance process; by failing to issue a decision on the merits of Plaintiff's grievance; by failing to select a grievance examiner to investigate or otherwise examine the grievances on the merits. Therefore, Plaintiff has appropriate issues for APA review. Alternatively, Plaintiff seeks enforcement by mandamus of the grievance remedy which preexisted and is part of the comprehensive regulatory scheme substantively protecting federal employees. Furthermore, Plaintiff is independently entitled to review of the administrative errors amounting to constitutional violations.

The district court determined in the case at bar:

> Based on *Fausto*, even if plaintiff, employed as a CSRA employee, was provided no remedy under CSRA, he would not be entitled to judicial review for

the type of personnel related issue set forth herein (p. 11).

However, Plaintiff is granted a remedy under agency grievance regulations but the agency has speciously rejected his grievance without considering the merits. The remedy has proven to be ineffective, and agency officials have retaliated against Plaintiff for asserting those remedies and for filing actions in the court to complain of the agency's refusal to reach the merits of his grievance. To apply a preemption theory to petitioner is to elevate this theory to a judicial veto of duly constituted regulatory and statutory rights.

Plaintiff's predicament presents a classic entitlement to mandamus relief for the agency's regulatory default. The district court improperly refused to exercise the mandamus jurisdication granted by Congress. By acceding to the agency's regulatory default and improper rejection of Plaintiff's grievances, the lower courts in effect condone continuing retaliation as set forth in the rejected amendment to the complaint in CA-8551 for a civil servant's exercise of rights hitherto guaranteed by regulation, statute and constitution.

2. *JURISDICTION AND ADEQUACY OF CONSTITUTIONAL CLAIM*

Petitioner has alleged a constitutional violation of his rights as well as violation of his veteran preference statutory rights and denial of administrative due process in the refusal to hear his grievances.

Even courts that have determined that CSRA preempts the implication of private rights to sue for violation of "prohibited personnel practice" under 5 U.S.C. § 2302 have indicated that the court will review constitutional violations alleged by federal employees when there is a protected property interest. *See Broadway v. Block*, F.2d 979 (5th Cir. 1982); *Veit v. Heckler*, 746 694 F.2d 508 (9th Cir. 1984). *Borrell v. U.S. Intern. Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) held that

there was no APA preemption of the constitutional remedy and stated:

> But we can find no clear signal in that legislative history that Congress meant to deprive appellant of the only cause of action to protect her constitutional rights and which she had even before the CSRA was passed (at 991).

Use of the CSRA to override established APA review of constitutional and statutory violations and denial of grievanee procedures established by regulation for federal employees is without foundation and upsets established notions of justice and law in the federal personnel arena.

Petitioner adopts the argument in support of Question "II" in his Petition for Certioriari in the companion petition seeking review of CA-8551, Court of Appeals for the Eleventh Circuit, which is equally pertinent to both petitions.

Plaintiff's liberty and property interest in the right to a hearing on his grievances, administrative due process, and a statement of the reasons for his non-selection to an external appointment must be ultimately preserved by resort to the Constitution. The lower courts erroneously rejected Plaintiff's constitutional claim for failure to state a claim.

II.

PETITIONER WAS DEPRIVED OF HIS STATUTORY VETERANS PREFERENCE ELIGIBILITY IN VIOLATION OF 5 U.S.C. § 3318 (B) (3) WHEN HE APPLIED FOR THE POSITION OF REGIONAL ATTORNEY AND WAS DENIED ANY REASON FOR HIS NON-SELECTION NOR DID THE AGENCY FILE ANY WRITTEN REASONS WITH THE OPM OR ITS OWN OFFICE JUSTIFYING THE VETERANS PASSOVER.

The lower courts' decisions incorrectly decided that Plaintiff's non-selection was for an internal promotion, and,

therefore, Plaintiff was not entitled to veterans preference rights. Defendant's assertion that Plaintiff is not entitled to a veterans preference for a selection of the Regional Attorney is incorrect and in head-on conflict with the memorandum of a member of General Counsel's own staff (HHS) which stated to the Acting General Counsel that a veterans preference should be accorded, a statement of reasons given in writing for nonselection of the veteran, and the reasons in writing for nonselection returned with the certificate of appointment (R.1., par. 24(a)(d) and (R. 12, Ex. A.); and the Attorney General's memorandum of September 24, 1979, rendered after adoption of the CSRA (R.12, Ex. D). The opinion to OPM states that the general direction of the Veterans Preference Act is that a preference is granted to eligible veterans in the excepted service.

Plaintiff adopts the argument in question "I" of his Petition for Certiorari in the companion petition seeking review of CA-8551, Court of Appeals for the Eleventh Circuit, which is equally pertinent to both petitions.

Plaintiff's reliance upon 28 U.S.C. § 1331 and 28 U.S.C. § 1361 as a jurisdictional basis in addition to the Administrative Procedure Act is appropriate. The veterans preference statute and regulatory scheme provide a distinct statutory avenue for relief under 28 U.S.C. § 1331 even if the APA did not. In addition, even if judicial review of so-called minor personnel actions were foreclosed by the enactment of CSRA, this would not forbid judicial review under 28 U.S.C. § 1361 to insure that agency proceedings adhere to statutory mandates. *See Burroughs v. Office of Personnel Management*, 764 F. 2d 1300, 1301 (9th Cir. 1985). 28 U.S.C. § 1361 states:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform the duty owed to the plaintiff."

Plaintiff has alleged that he applied for appointment to the position of Regional Attorney. Defendants have not shown as a

matter of law by evidence or authority that he was not seeking an "appointment", whether or not it would be a promotion as well for an appointee already in the Office of General Counsel. The determination that the selection was one of internal promotion is incorrect and is unsupported by the record on Defendant's Rule 12(b)(6) motion. The lower courts erred by concluding that Plaintiff as a matter of law was not entitled to a veterans preference. As a matter of law, and based upon the facts alleged by Plaintiff, which are not contested, Plaintiff was improperly denied a veterans preference.

III.

THE LOWER COURTS ERRONEOUSLY PERMITTED THE AGENCY TO WITHHOLD RECORDS RELEVANT TO PETITIONER'S GRIEVANCE THAT THE SELECTION PROCESS OF THE OFFICE OF GENERAL COUNSEL, DEPARTMENT OF HEALTH AND HUMAN SERVICES, WAS FLAWED IN ITS SELECTION OF A REGIONAL ATTORNEY.

Plaintiff sued for relief in Count IV under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Plaintiff sought records of the Office of General Counsel, HHS, characterized as the "promotion file" for the position of the Regional Attorney, Region IV. (A misnomer since in reality it should be an "appointment file", the position having been advertised on an open basis to all qualified applicants, whether in or out of federal service). These records consist of applications, notes of interviews, evaluations and memos on all candidates for the position. The agency supplied Plaintiff with some records only applicable to him and the successful candidate. The promotion file records should also contain records on rating, ranking and grouping of the candidates, background checks, and reference checks on candidates from Regional Directors and other persons shown as references. In Response to a Request for Admission, par. 14, Defendant admitted that generally HHS maintains "merit promotion packages" for vacancies advertised and filled through the competitive process

(R-14). Plaintiff takes this response to be an admission to the statement "That HHS is required to maintain a file of documents relating to appointments and selections".

Defendant contends that certain records are not disclosable under the FOIA because they are exempt as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b) (6). Defendant further contends that certain records are not disclosable because they are intra-agency predecisional documents, and as such not available as "inter-agency or intra-agency memorandums or letter which could not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 553(b) (5). Finally, the agency argues that Plaintiff has not exhausted its administrative remedies in seeking production of some of the documents under the FOIA.

Defendant asserted only those grounds stated above in justifying its withholding of records. The burden is upon Defendant to justify withholding. *Ely v. F.B.I.*, 781 F.2d 1487 (11th Cir. 1986). As stated in *Ely*:

> The Act's disclosure provisions are read broadly, its exemptions narrowly. (Citation omitted). The burden is squarely on the government to prove that the information in question is covered by one of the exemptions (Citations omitted).

The agency must provide relatively detailed justification, and specifically state reasons why a particular exemption is relevant. Defendant's denial of the administrative FOIA appeal states only:

> I believe the scoring matrices to be predecisional and deliberative and withholdable under Exemption 5 of the Freedom of Information Act (FOIA). In addition, I believe the applications of the remaining applicants are withholdable under Exemption 6 of the FOIA. (R22).

The district court's order upheld the government's denial of applications, scoring matrices, interview summaries, evaluations, rating, ranking and grouping records prepared on other candidates other than Plaintiff and the selectee on the basis that Plaintiff "has not shown that a public interest exists." (at 13-18). These documents should show whether Plaintiff was the only candidate entitled to a veterans preference, whether the veterans preference was denied, and whether the selection process was defective as alleged by Plaintiff.

1.

Interview Summaries

The decision of the appeal officer speaks only to the withholding of (1) the applications of the other candidates and (2) scoring matrices of the other candidates. The interview summaries and narrative summary of qualifications of other candidates were not mentioned in the administrative appellate decision other than that there are no other records, and thus no privilege is claimed for withholding those documents. (Only interview summaries and narrative evaluation memos of Plaintiff and selectee were furnished by Carl C. Coleman, Director, FOI/Privacy Division, HHS.) The predecisional or deliberative process privilege must be asserted by the head of an executive department. *United States v. Capitol Service, Inc.*, 89 F.R.D. 578, 583 (E.D. Wisc. 1981).

No privilege having been invoked by the administrative appeal officer or head of the department as to interview summaries and narrative evaluation memos, no privilege has been asserted. The "promotion file" was requested in paragraph 13. of the FOIA request of September 11, 1985:

> Any files maintained by Office of General Counsel, Washington, D.C. on vacancy announcement 85-GCA-2 and selection of a Regional Attorney, Region IV (R. 22, Ex. 1).

This file would necessarily include interview summaries of all candidates and evaluation memos. Absent the affidavit of an appropriate official such as Carl C. Coleman that there are specifically no interview summaries and narrative evaluation memos of other candidates, these summaries and memos should have been produced and the district court erred by failing to order production.

2.

Scoring Matrices

The administrative appeal officer asserted privilege under Exemption 5 (intra-agency memorandums) to the release of the scoring matrices. These scoresheets were compiled by Associate General Counsel Isabel Dunst on each of the candidates interviewed for the position. (A copy of the matrix furnished is at R-30, Ex. 2). Associate General Counsel Dunst devised a scoring system on each of the candidates interviewed based on attributes she added in lieu of or in addition to those qualities stated in the announcement. Defendant contends that the matrices not disclosed would express opinions of agency personnel and are protected by the "deliberative process" privilege. While opinion may be found, the matrices should primarily reflect Ms. Dunst's assessment of the candidate's background and experience. The assessment should be fact based — the candidate's background, experience, and prior performance as objectified in periodic performance reports. It would be ironic justice to withhold documents because they may purely express subjective opinions on candidates by agency personnel instead of objective numerical ratings based on the candidate's background, experience and prior performance.

In the present instance, Ms. Dunst employed a scoring matrix quantifying attributes which did not conform to the vacancy announcement, nor to the weighted scheme of the vacancy announcement (which ranked qualities in order of importance). Not only did Ms. Dunst use an unacceptable scoring matrix, but afterwards advised the recommending official (Acting General Counsel Coleman) that Plantiff did not merit further consideration with the

remaining candidates. (R-30, Exhibit 3). This instance of the "blackball" demands, in the public interest of appointing the most highly qualified civil servants, that the scoring matrices of the remaining candidates be disclosed so that the basis for Ms. Dunst's evaluation of other candidates can be assessed.

The agency has failed to establish that the decisional privilege is applicable to the scoring matrices. Defendant has released scoring matrices of Plaintiff and the successful candidate. By this disclosure, Defendant has admitted that no decisional privilege is at stake nor is the privilege relevant to the request for scoring matrices of other candidates. Otherwise, Defendant would have refused to disclose all matrices. The partial disclosure made by Defendant is proper, and it is improper to withhold the matrices of all other candidates on the assertion of decisional privilege, especially where no logical distinction in terms of decisional privilege can be made for releasing the scores of two candidates, and refusing the remainder. The memo by Ms. Dunst blackballing Plaintiff was released under the FOIA. Acting General Counsel Coleman adopted the rationale and decision of Ms. Dunst to blackball Plaintiff from further consideration. It would be anomalous to release the blackball conclusion of Ms. Dunst but not the scoring matrices which she devised and ostensibly relied upon for her blackball of Plaintiff. In addition, the scoring matrices not disclosed do not reflect a give-and-take of the consultive process. They are score sheets of, by and from Ms. Dunst. Predecisional materials are not exempt merely because predecisional; they must be part of the agency give-and-take by which the decision itself is made. *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975). The context of all documents divulged reflects that Ms. Dunst played no consultive role except to the extent reflected in the document previously disclosed. (R.30, Ex. 3).

3.

Scope of Discovery

The deliberative process privilege should be reserved for personnel decisions only at policy making levels. At lower levels,

any rationale of protecting candor in government operations pales in comparison to the public's interest in government personnel efficiency, the emphasis on resolution of employee dissatisfaction under informal and formal grievance systems, and the protection of the merit system embodied in the Civil Service Reform Act and merit promotion policies (*See e.g.* Instruction 335-6 HEW Merit Promotion Program attached to Defendant's Response to Plaintiff's Request For Production of Documents (R. 32)). The public interest in disclosure outweighs the slight possiblity that personnel decisions will be less candid because of the availability of documentation by those affected such as Plaintiff. It is no longer the legitimate function of the government to make personnel decisions in secret and to guard the secrecy by withholding the deliberations. The deliberative process privilege is misapplied in this action where Plaintiff alleges serious irregularities in the selection process and denial of regulatory and statutory rights in his futile administrative attempt to have his grievance heard.

Exemption 5 protects only those memoranda which would not normally be discoverable in civil litigation against an agency. *Ryan v. Dept. of Justice*, 617 F.2d 781 (D.C. Cir. 1980). In this case, in non-FOIA counts, Plaintiff challenges the denial of a hearing on his grievance. His grievance is based on defects in the selection process for the position of Regional Attorney. The district court erred by failing to order Defendant to produce the ratings made by the review panel which is the initial step of the selection process. Plaintiff contends that the group of candidates, including but not limited to appointee and Plaintiff, was not properly ranked and certified. The ratings of other candidates both by the review panel and afterwards by Ms. Dunst in her matrices are indispensably relevant to the merits of Plaintiff's action. There is no secrecy to any deliberative processes employed by the Department in its evaluation and selection of candidates. The process in which rating sheets are employed and the deliberative factors are fully set out in Personnel Management WTSC Instruction No. 335-1, May 10, 1985, Appx. A. (R-30, Ex. A). Any true deliberative process would be limited to any oral deliberations of the review panel before arriving at scores. The scores are the culmination of any de-

liberative process, and not deliberative material as defined in *Wolfe v. Dept. of Health and Human Services*, 630 F. Supp. 546 (D.D.C. 1985) *aff'd* 815 F.2d 1527 (D.C. Cir. 1987). In *Wolfe*, the district court rejected Defendant's contention that the factual details of particular, ongoing, decisionmaking processes are as protected by the deliberative process privilege as the recommendations or underlying advice themselves. (*Id.* at 550). Likewise, in this case, the factual numerical evaluations are not privileged because associated in some specifically undefined fashion with recommendations or underlying advice. The deliberative process to be employed having been detailed in the agency manual, there is an implicit waiver to the release of such information. Similarly, there is no basis for Defendant to contend that information on the ratings employed in the selection process are not available under discovery where the method of selection is at the core of the controversy.

4.

Applications of Other Candidates

The applications of unsuccessful candidates, with the exception of Plaintiff, were withheld under 5 U.S.C. § 552(b) (6), the privacy exemption. The applications were not submitted to the Personnel Division of the agency, but rather to the Office of General Counsel. The applications are presumably made a part of a "merit promotion package" or a "promotion file" maintained by the Office of General Counsel. This file is subject to inspection and review by various employees and agents of the agency. Defendant has shown no regulations or policies promulgated by the Office of General Counsel restricting access to the applications. The FOIA was intended to increase public access to records through imposition of liberal disclosure limited only by narrowly constructed exemptions. *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973).

The documents sought under the FOIA were originally for the purpose of proving irregularities in the grouping, rating, ranking and certification of candidates in direct relation to Plaintiff's

then pending grievance. The grievance was rejected, and Plaintiff's request for deferral pending receipt of FOIA documents was denied. Pending Plaintiff's administrative appeal of the rejected grievance, the FOIA appeals official upheld denial of all documents withheld (2 newly discovered documents were released). Now, Plaintiff appeals the arbitrary administrative action rejecting consideration of his grievance, and the FOIA withholding. In pursuing this FOIA claim, Plaintiff promotes two important interests: (1) ensures that Defendant fairly follows merit selection procedures and (2) encourages the use of non-disruptive grievance procedures in employment disputes. *See Celmins v. U.S. Dept. of Treasury, etc.*, 457 F. Supp. 13, 15-16 (D.D.C. 1977). Compared to these considerations, the speculated risks of a breach of privacy are overstated.

Not only has the identity of other candidates been revealed by Defendant, but there has been no indication previously that the applications contain information adverse to the candidates. The applications of the selectee and Plaintiff, which were disclosed, contained no personally adverse information. It is very unlikely that the applications of the remaining qualified candidates contained any despite the observation in the Defendant's brief that records of arrest are revealed in the applications (Brief, R-22-16). Presumably this is a general statement inapplicable to the applications of the candidates. If such adverse information applies to an application in question, this could be exhibited *in camera* and deleted. In addition, any purely personal private information such as marital status, name of spouse, or date of marriage, could be deleted. Much of the remaining information about the applicants intended to be personally identifying would be contained in standard professional reference books such as Martindale-Hubbell. In fact, inquiries are routinely made to supervisors and heads regarding the performance and qualities of applicants. In the case of Plaintiff, inquiries to the Regional Director of the agency and other agency officials such as the Social Security Commissioner, are documented (R. 22, Ex. 4). The concern that knowledge of a pending application and even non-selection would be injurious to an employee as a result of the disclosure is exaggerated without a

showing more particularized than presented here. Defendant's contention of possible embarrassment or harm to applicants whose application is disclosed is stated only in the broadest speculative terms without evidentiary support, and thus any possible harm does not outweight the public interest in disclosure that would encourage the merit selection of supervisory civil service attorneys, such as a Regional Attorney who in this case supervises numerous attorneys, paralegal staff, and other employees, with a large degree of responsibility to members of the public. Information regarding education, former employment, academic achievements and qualifications of government employees is not reasonably so personal to be a clearly unwarranted invasion of privacy exempting disclosure. *Associated General Contractors v. U.S. Environmental Protection Agency*, 488 F. Supp. 861 (D. Nev. 1980).

The greater consideration is whether on balance the disclosure is in the interest of the public and outweighs any consideration of privacy. The interest of the public in an efficient civil service and attorney corps is paramount to any speculative concern of personal privacy present in this case. The agency has failed to provide a detailed justification for exemption of the scoring matrices. *See Meade Data Central, Inc.*, 566 F.2d 242 (D.C. Cir. 1977). Any substantial considerations of personal privacy can be protected *in camera* and by appropriate editing, deletion, or other safeguards.

5.

Other Documents Which Should Necessarily Be Included In the Promotion File

Other existing documents in the "promotion file" or other files of Defendant have not been produced in addition to the interview summaries, narrative evaluation summaries, and applications as follows:

(1) Documentation in support of grouping, rating and ranking of candidates;

(2) Documentation of remarks on candidates solicited from Regional Director George Rudy; and

(3) Ms. Dunst's notes.

It is unlikely that the personnel of the agency charged with reviewing the applications of the candidates to determine qualified and best qualified applicants failed to produce notes, memoranda or other documentation with the exception of the brief memorandum of Darrell Grinstead listing only the names of the qualified candidates. (R. 30, Ex. 1A). The memo itself states that evaluation sheets were prepared for each applicant in their consideration of the "best qualified" candidates. Documentation of rating and ranking was generally requested in the original FOIA letter and specifically in Plaintiff's request for the search of additional records and administrative appeal of October 23, 1985 (R. 22, par. 13, Exs. 1, 6). Plaintiff has exhausted its administrative remedy to obtain these documents.

In discovery, Defendant responded to Plaintiff's request for all documents relative to the grouping, ranking and rating of candidates:

> Objection. These records are subject to the deliberative process privilege (R. 32, par. 2.)

No exemption has been asserted relative to these documents in the FOIA appeal officer's letter of January 10, 1986. Furthermore, any indication in the declaration of Carl C. Coleman that such documents do not exist is refuted by Defendant's admission in its production response that such documents do exist, but are privileged.

6.

Newly Discovered Documents

Footnote 1 of Defendant's trial reply memorandum (R. 31) made the revelation — after Defendant had previously responded to a FOIA request, FOIA appeal, and Plaintiff's First Request For

Production of Products — that an additional group of records exists never previously mentioned in response to Plaintiff's prior attempts to elicit documents. These "score sheets" (or evaluation sheets) should not be confused with the interview summaries and narrative summaries of qualifications discussed in Section I of Plaintiff's Response To Defendant's Motion For Summary Judgment On Count IV. (R. 25). These documents are now first identified in the supplemental Coleman Declaration (Coleman Declaration II). (R. 31). Mr. Coleman's actions as HHS Freedom of Information Officer in "inadvertently omitting" (his words) to disclose the existence of the score sheets of the rating panel results in the waiver by Defendant of the deliberative process privilege now invoked.

Defendant, as in the case of other documents being withheld, has not attempted to reveal in any detail the format of the documents or to justify in detail the deliberative process involved or any lack of segregable materials in the documents. The agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process. *Coastal States Gas. Corp. v. Dept of Energy*, 617 F.2d. 854, 868 (D.C. Cir 1980); *see Bernson v. I.C.C.*, 625 F.Supp. 13, 16 (D. Mass. 1985). Only documents containing deliberative materials as opposed to factual material are subject to the deliberative process privilege, and then only if release of the opinion would restrain the candor of government operations. *See Wolfe v. Dept. of Health & Human Services*, 815 F.2d 1527, 1533-4 (D.C. Cir. 1987).

The records being withheld are in the distinct category of documents requested by Plaintiff in conjunction with his FOIA appeal:

> I request further search for papers or files in the OGC or the Personnel Office of the Department which would reflect additional documentation relative to the selection process and the selection of Regional Attorney, Region IV.

* * *

> There is no basis in the scant documentation disclosed to conclude that the review panel made any evaluative judgments. For instance, the review panel should have prepared and retained documentation of the ranking working order of "best qualified" candidates referred for selection. FPM 335-4, Subch. 1-4 states "Each agency must maintain a temporary record of each promotion sufficient to allow reconstruction of the promotion action, including documentation on how candidates were rated and ranked." Therefore, further search and disclosure for pertinent policy or directives to the review panel and documentation of any rating or ranking are essential disclosures. (par. 13, Defendant's Exhibit 6 to Coleman I Declaration) (R. 22).

Thus, Plaintiff asked precisely on October 23, 1985, for the group of documents only now discovered by Mr. Coleman to have been omitted although a general request for these documents had been made earlier to Mr. Coleman (Par. 13, Ex. 1 to Coleman I Declaration) (R-22).

Plaintiff, in the same letter of October 23, 1985, to the FOIA appeals officer sought a further search by Mr. Coleman:

> While this review is directed to you as the appropriate official pursuant to 45 C.F.R. 5.82, I am also submitting a copy of this request for review to Carl C. Coleman. It is believed that a further search as requested for particular documents would be productive, and a basis for further disclosure. I am dissatisfied with the withholding of records identified, request their disclosure and request a search for additional likely existing material. (Last par. Defendant's Exhibit 6 to Coleman I Declaration) (R. 22).

An inadvertent omission announced in Coleman Declaration II is without any explanation. Coleman Declaration I declares un-

der penalty of perjury that "Plaintiff was notified of all records which exist that are responsive to his request." This statement was admittedly inaccurate. Not only does Defendant assert an untimely claim of privilege to materials inadvertently omitted from disclosure — a sizable number of papers if, as claimed, it contains evaluations of announcement factors on 20 candidates — but Defendant deprives Plaintiff of a significant administrative appeal by initially invoking deliberate process privilege at the judicial level. Plaintiff is deprived of the opportunity to administratively appeal the withholding by Mr. Coleman of these score sheets. The district court refused Plaintiff's request to defer final ruling on Defendant's Motion for Summary Judgment On Count IV pending remand to the agency for Plaintiff to appeal Mr. Coleman's denial of score sheets to the FOIA appeals officer of any agency. The Court of Appeals trivialized the Freedom of Information Act by approving the lower court's decision.

Without an affidavit from the appropriate agency official to the specific effect that no documentation exists relative to grouping, rating, ranking and certification of candidates, background checks of candidates and comments solicited from Mr. Rudy, these selection related documents in whatever designated file should be ordered to be produced and Defendant should at the same time produce an index and brief summary of all section related documents. Without the index, the Court as well as Plaintiff, are at a disadvantage to ascertain whether such documents exist. Moreover, an index will expedite any necessary further discovery and facilitate a just and prompt disposition of all pending claims. Finally, there is no proof submitted by Defendant that this or any claim of privilege has received the personal attention of the head of the agency. *See A. O. Smith v. F.T.C.*, 403 F.Supp. 1015 (D.Del. 1975).

Ms. Dunst is alleged in the Complaint to have committed improprieties in the selection process and to have personally eliminated Plaintiff from selection based upon her evaluation and "blackball" memorandum. Her Declaration that she "participated in gathering records" in order to respond to the FOIA request is

not an indicia of reliability nor was she a proper research delegate for the HHS Freedom of Information Officer in view of the grievance allegations already made by Plaintiff at the time of her search. The agency was wrongfully permitted to withhold relevant documents in the "promotion file" and should have been required to furnish an index of those documents.

CONCLUSION

It is requested that a Writ of Certioriari be issued to the Court of Appeals for the Eleventh Circuit for review of the issues presented in this petition.

Respectfully submitted,

BEVERLY B. BATES
(Counsel of Record)

BATES, BAUM & LANDEY
Suite 3500
101 Marietta Tower
Atlanta, Georgia 30303
(404) 681-2200
Counsel for Petitioner

August 20, 1990

Appendix A

James N. STEPHENS,
Plaintiff-Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, Secretary,
Defendant-Appellee.

James N. STEPHENS,
Plaintiff-Appellant,

v.

Terry S. COLEMAN, Isabel P. Dunst,
Defendants-Appellees.

Nos. 89-8550, 89-8551.

United States Court of Appeals, Eleventh Circuit.

May 23, 1990.

Appeals from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, Circuit Judge, and RONEY* and ALDISERT**, Senior Circuit Judges.

ALDISERT, Senior Circuit Judge:

The major question presented in these appeals by James N. Stephens, Deputy Regional Attorney of the Department of Health and Human Services (HHS), who was an unsuccessful candidate

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* See Rule 34–2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Ruggero J. Aldisert, Senior U.S. Circuit Judge for the Third Circuit, sitting by designation.

for the office of Regional Attorney, is whether the district court properly concluded that the grievance procedure set forth in the Civil Service Reform Act of 1978 (CSRA), codified and amended in various sections of 5 U.S.C., precludes federal court review of an alleged "prohibited personnel practice," where the Office of Special Counsel declines to petition the Merit Systems Protection Board for consideration of the complaint. Appellant also alleges the district court erred by: 1) refusing to compel the HHS to turn over records pursuant to a Freedom of Information Request (FOIA); 2) erroneously approving HHS' failure to grant appellant a veterans' preference; and 3) failing to exercise personal jurisdiction over two government employees. Because we hold that the administrative procedure set forth in the CSRA and approved in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988) precludes judicial review in this case, and that the collateral claims asserted have no merit, we affirm the judgment of the district court.

Jurisdiction was proper in the trial court based on 28 U.S.C. § 1331. We have jurisdiction on appeal pursuant to 28 U.S.C. § 1291. The appeal was timely filed under Rule 4(a), F.R.A.P.

Stephens' substantive claims based on his non-selection and all allegations of injustice stemming from the grievance procedure were dismissed for failure to state a claim. The standard of review for a motion to dismiss is the same for the appellate court as it was for the trial court. On a motion to dismiss, the facts stated in appellant's complaint and all reasonable inferences therefrom are taken as true. *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir.1988).

The district court granted summary judgment as to the FOIA request. When this court reviews the grant of a motion for summary judgment, all the facts and inferences therefrom are viewed in the light most favorable to the appellant. *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 656 (11th Cir.1983).

Whether the district court correctly determined that Stephens was not subject to a veterans' preference is a mixed question of

law and fact. As to the fact portion of the mix, we apply the clearly erroneous rule. As to the legal component we will apply the plenary review standard. *See United States v. Wilson*, 894 F.2d 1245 (11th Cir.1990).

I.

In May of 1985, the HHS Office of General Counsel (OGC) announced a vacancy for the position of Regional Attorney (now called Chief Counsel), Region IV, Atlanta, Georgia. Stephens, who had been acting Regional Attorney for seven months, applied for the position. He asserts he was extremely qualified for the position, having been ranked number three in his class at Wake Forest Law School, a Deputy Regional Attorney for 11 years and having been assigned numerous important projects during his 21 years at HHS. Mr. Stephens was notified on August 14, 1985, that Mr. Granger had been appointed to the position.

A.

In September of 1985, appellant filed a grievance with the OGC, alleging that the selecting officials had not followed HHS or federal regulations in selecting the Regional Attorney. While his grievance was pending, appellant sought various documents relating to the appointment of Granger as Regional Attorney through a Freedom of Information Act (FOIA) request.

Appellant filed a second grievance with OGC on October 25, 1985, alleging additional errors in the selection process. This grievance was rejected on November 19, 1985. Appellant's subsequent request for an investigation and hearing by another hearing officer was rejected on January 30, 1986. While these grievances were pending, appellant filed a discrimination complaint with HHS. The discrimination complaint was based on the same facts as the two prior grievances. Appellant failed to notify the grievance official of the pending HHS grievance. HHS, accordingly, refused to reconsider dismissal of the grievance.

Stephens subsequently filed a grievance with the Office of Special Counsel (OSC) of the Merit System Protection Board (MSPB), a special independent ombudsman-type official. 5 U.S.C. § 1205. The OSC concluded that the regulations claimed to have been violated by HHS did not apply to Stephens because he was an exempt employee. Additionally, the OSC refused to address the discrimination issues alleged because it was office policy to leave those issues to determination by the Equal Employment Opportunity Commission. The OSC, therefore, declined to petition the Merit Systems Protection Board for consideration of Stephens' complaint. By operation of the statute describing the Office of Special Counsel, all review ended when that office declined to petition the Board for consideration of the grievance. 5 U.S.C. § 1214.

B.

On August 26, 1986, appellant filed an action in district court challenging HHS' decision not to promote him, the rejection of his grievance, and the failure of HHS to release all documents requested in his FOIA request (complaint I). He alleged that: 1) HHS had violated the Administrative Procedure Act (APA) by not complying with various statutes and regulations during the selection process and the grievance procedure; 2) he was denied due process by HHS' failure to grant him a veterans' preference; 3) HHS violated his due process and equal protection rights; and 4) HHS improperly withheld information requested pursuant to the FOIA. The complaint was amended to allege that appellant had been penalized in promotion because he refused to provide derogatory information about his former supervisor. He also added a claim for damages to his reputation by non-selection for the position of Regional Attorney.

In August 1987, he filed a companion case against the individual defendants, Coleman and Dunst (complaint II), seeking essentially the same relief only to the extent relief is determined to be unavailable against defendant in complaint I. The complaint of August 1987 required the court to exercise personal jurisdiction

over Mr. Coleman and Ms. Dunst based on their participation in appellant's non-selection. Appellant asserted a *Bivens* claim against the two defendants in their individual capacity for their alleged deprivation of his constitutional entitlement to a veterans' preference. He again argued that he was entitled to a veterans' preference.

On April 5, 1989, the district court dismissed the promotion and grievance counts and granted appellee's motion for summary judgment on the FOIA claim in complaint I. The court held that the Civil Service Reform Act provided the exclusive remedy for the personnel actions alleged. The court did review the claim as to the veterans' preference but concluded that the preference was only available for initial appointment or retention of job. Because the position of Regional Attorney would have been a promotion for Stephens, a veterans' preference was not available. *Stephens v. Secretary, Dep't of Health and Human Servs.*, No. 1:86-CV-1875-HTW, at 13, ___ F. Supp. ___, ___ (April 5, 1989) [hereinafter *Stephens I*]. As to the FOIA claims, the court held that appellant had been provided with the information most relevant to his non-selection and that the additional material was properly withheld pursuant to 5 U.S.C. §§ 552(b)(5) and (6). *Stephens I*, at ___ - ___.

The district court dismissed complaint II for lack of personal jurisdiction and failure to state a claim. The court concluded that "plaintiff may not obtain *Bivens* relief against federal officials in their individual capacities in this case as Congress has provided comprehensive procedural and substantive provision which give meaningful remedies against the United States by way of the CSRA." *Stephens v. Coleman*, 712 F.Supp. 1571, 1581 (N.D.Ga.1989) (relying on *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988); *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983)).

II.

Stephens' main contention, and the only contention we will discuss at length, concerns the preemptive effect of the CSRA. This argument takes three tracks. First, he contends that the CSRA

is not the exclusive remedy for preference-eligible, exempt, federal employee relief. He next argues that even if we determine that private rights for "prohibited personnel practices" are preempted by the CSRA, the federal courts nevertheless have jurisdiction over his claim because he has asserted constitutional violations. Finally he argues that even if the CSRA preempts other judicial review, he still has a *Bivens* action against Coleman and Dunst in their individual capacities.

Stephens also contends that the district court erred in entering summary judgment in favor of HHS by determining that certain materials sought by him under the Freedom of Information Act ("FOIA") are exempt from disclosure. He challenges the ruling that he was not entitled to a veterans' preference. Finally, Stephens asserts that the district court erred in dismissing his complaint against Coleman and Dunst for lack of personal jurisdiction. We agree with the district court's personal jurisdiction conclusion, but it will not be necessary to discuss this point because we conclude that the trial court did not err in its alternatived basis for dismissal—that Stephens' contentions on the merits may not survive a motion to dismiss.

III.

Stephens argues that the CSRA is not the exclusive remedy for federal employees, alleges that the statute does not state that it is exclusive and does not cover all employee personnel actions. He contends that the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and mandamus, 28 U.S.C. § 1361, were designed to provide an additional remedy for aggrieved federal employees in the federal courts. In support of this view, he relies on pre-CSRA procedures, suggesting that the APA was available to preference-eligible, exempt federal employees claiming statutory violations. *See Kletschka v. Driver*, 411 F.2d 436 (2d Cir.1969). He argues that no court should restrict judicial review absent a "showing of 'clear and convincing' legislative intent." *See* Brief for Appellant at 40 (citing *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 105 S.Ct. 162, 84 L.Ed.2d 674 (1985)). He acknowledges the

existence of a preemption line of cases, but suggests that we have rejected those cases. *See Grier v. Secretary of the Army*, 799 F.2d 721 (11th Cir.1986); *Gleason v. Malcom*, 718 F.2d 1044 (11th Cir. 1983). Stephens asserts that the mere fact the CSRA provides for review of certain personnel actions by the OSC, then the MSPB and in some cases the Federal District Court or the Court of Claims, does not evince an intent by Congress to deny APA review in those cases where the CSRA does not provide for review by the MSPB. Indeed, he argues such an interpretation would frustrate the reformative intent of the CSRA by denying review of an agency's failure to follow its own procedures. Appellant says he is not seeking review of the merits of his grievances in this court, but rather a review of the agency's misconduct in handling his grievance.

Unfortunately for the appellant, his multitudinous, voluminous and extremely innovative arguments have been foreclosed by the Supreme Court. In *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), the Court held than an exempt, non-preference, federal employee, who had exhausted his administrative grievance procedures and was not provided further avenues for relief or appeal under the administrative review provisions of the CSRA, did not have a right to bring an action in federal court against the government for the alleged prohibited personnel practice. *Id.* at 447-52, 108 S.Ct. 677-79. The court faced head on the argument that pre-CSRA statutes and case law would have provided the employee with review and rejected the contention outright. *Id.* at 454-55, 108 S.Ct. 680-81. The court held that the CSRA was now the exclusive remedy of the federal employee. We believe *Fausto* applies to preference-eligible as well as non-preference employees.

We hold that under *Fausto*, and a number of cases of the U.S. Courts of Appeals, the CSRA is Stephens' exclusive remedy. *See, e.g., Towers v. Horner*, 791 F.2d 1244, 1246 (5th Cir.1986); *Schrachta v. Curtis*, 752 F.2d 1257, 1260 (7th Cir.1985). Cases in this court are not to the contrary. Although our decisions in *Grier* and *Gleason* were made after the effective date of the CSRA, and

permitted APA review, they failed to mention the CSRA. More importantly, both cases were decided before *Fausto*, which emphatically and conclusively established the preemptive nature of the CSRA. *See Grier*, 799 F.2d 721; *Gleason*, 718 F.2d 1044.

Moreover, the APA expressly excepts review where the relevant statute "preclude[s] judicial review," 5 U.S.C. § 701(a)(1), or where the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). "[T]he comprehensive nature of the . . . CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA, or not at all." *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir.1984). The same argument applies to appellant's request for mandamus, 28 U.S.C. § 1361. No right to mandamus exists where other adequate remedies are available. *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir.), *cert. denied*, 449 U.S. 832, 101 S.Ct. 100, 66 L.Ed.2d 37 (1980). The CSRA provides other adequate remedies. *Towers v. Horner*, 791 F.2d 1244, 1247 (5th Cir.1986).

We conclude that the holding of *Fausto* is applicable to a preference-eligible federal employee, like Stephens, as well as a non-preference eligible employee, as was before the court in *Fausto*.

IV.

Stephens' argument based on alleged deprivations of constitutional rights also cannot carry the day. He is simply recharacterizing the basis of his APA claim as a constitutional violation. The Supreme Court has recently explained that it will not permit additional remedies for alleged constitutional violations where "Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *Chilicky*, 487 U.S. at 413, 108 S.Ct. at 2462. The CSRA provides adequate remedial mechanisms. *See, e.g., Pinar v. Dole*, 747 F.2d 899, 910-11 (4th Cir.1984) (CSRA mechanisms preclude all other judicial intervention), *cert. denied*, 471 U.S. 1016, 105 S.Ct. 2019, 85 L.Ed.2d 301 (1985); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961 (10th Cir.1989)

(employee terminated for alleged infringement of first amendment rights did not have *Bivens* action or injunctive relief available as a remedy).

V.

Stephens' final argument that he is entitled to federal court review of this alleged prohibited personnel practice takes the form of a *Bivens* claim. Stephens asserts he has "a legitimate entitlement to a veteran's preference, to a hearing on his grievance, and to the issueance of a validly processed and validly issued appointment certificate to the vacancy for which he applied." Brief for Appellant at 21. He sees this as both a liberty and a property interest and says that deprivation of these rights are prohibited by the equal protection and due process clauses of the fifth amendment. He also claims that his first amendment rights were violated when he was retaliated against for refusing to criticize his former employer. Therefore, he believes he is entitled to bring a *Bivens* action.

In support of this conclusion, he relies principally on the concurring opinion of Justice Blackmun in *United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), stating "this court has long recognized that the Constitution itself supports a private damages action against a federal official." *Id.* at 455, 108 S.Ct. at 681 (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)). He attempts to distinguish *Schweiker v. Chilicky*, 487 U.S. 412, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988) by contending that Congress has not decided that his rights are not reviewable in federal court, as was the case of the Social Security Act in *Chilicky*.

Stephens also relies on the distinction set forth in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) between a public employee speaking as a citizen about matters of public concern instead of as an employee speaking about matters only of personal interest:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. . . .
>
> . . . [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 146-147, 103 S.Ct. at 1690. *See also, Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2898, 97 L.Ed.2d 315 (1987) (threshold question is whether speech is on a matter of public concern).

Finally, he argues, somewhat irrelevantly, that *Webster v. Doe*, 486 U.S. 592, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) emphasizes the court's reaffirmance of the district court's role in reviewing federal personnel decisions under the APA.

A *Bivens* action is only permitted where 1) the petitioner has no alternative means of obtaining redress, and 2) there are no "special factors counseling hesitation." *Bivens*, 403 U.S. at 396-97, 91 S.Ct. at 2005.

> [W]hen the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administration [we have not created additional *Bivens* remedies].

Chilicky, 487 U.S. at 424, 108 S.Ct. at 2468; *see Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). In addition, this court has recognized that the comprehensive statutory scheme

established by Congress relating to federal employment (CSRA) precludes the maintenance of job-related Bivens actions by federal employees. *McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir.1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987); *Wells v. FAA*, 755 F.2d 804, 810 (11th Cir.1985).

We agree with the district court that Stephens' contentions are limited to a matter of acute personal interest—a job; his contentions do not implicate the type of public concern discussed in *Connick*. Because we take this view, Stephens may find no solace in *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir.1988).

Finally, *Webster v. Doe* does not support appellant's position. There, suit was brought against the CIA's director in his official capacity for declaratory and injunctive relief for alleged constitutional and statutory claims. The Court held the constitutional claims were judicially reviewable. No "individual" liability was sought. *Webster* has nothing to do with *Bivens* actions. *Webster*, 486 U.S. 592, 108 S.Ct. 2407.

VI.

As to Stephens remaining contentions: that he was entitled to the entire promotion file in his Freedom of Information Act request, that he was entitled to a veterans' preference, and that the district court erred in concluding that it did not have personal jurisdiction over Coleman and Dunst for complaint II, we have reviewed the arguments and contentions raised by appellant and determine they are without merit.

The information requested by Stephens and not disclosed by HHS is privileged as "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5), or as an "unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The district court did not err when it refused to require HHS to produce these documents.

We conclude that the decision of the district court determining that Stephens' application for the position of Regional Attorney was an application for promotion is consistent with the facts and arguments set forth in the record. Therefore, we affirm the decision of the district court upholding HHS' decision not to grant Stephens a veterans' preference. *See Noble v. Tennessee Valley Authority*, 876 F.2d 1580, 1583, *appeal dismissed*, 891 F.2d 1013 (Fed.Cir.1989) (en banc).

Finally, we agree with the district court's refusal to exercise personal jurisdiction over Coleman and Dunst. Because of our holding as to the court's dismissal of the substantive claims, we have elected not to discuss this issue.

VII.

We have considered all contentions presented by the appellant in both appeals. The judgments of the district court are AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES N. STEPHENS,	:	
Plaintiff	:	
vs.	:	CIVIL ACTION
SECRETARY, DEPARTMENT OF	:	FILE NO. 1:86-CV-
HEALTH AND HUMAN SERVICES,	:	1875-HTW
Defendant	:	

ORDER OF COURT

This matter is pending before the court on defendant's motions to dismiss counts one, two, and three of the original complaint and count five of the amended complaint and for summary judgment as to court four. Plaintiff has submitted a response to defendant's motions.

At the time the action was instituted, plaintiff was Deputy Chief Counsel for the Department of Health and Human Services (HHS) in Region IV, Atlanta, Georgia. Plaintiff challenges the decision of HHS not to promote him to the position of Regional Attorney. He also alleges wrongful rejection of a grievance filed by him with HHS to dispute the denial of the promotion.

Specifically, in Count I, plaintiff alleges that HHS, through the actions of the selecting officials for the position at issue acted arbitrarily and capriciously in violation of the Administrative Procedures Act (ACT), 5 U.S.C. § 701 *et seq.*, by not complying with various statutes and regulations during the selection process and in handling plaintiff's subsequent grievance. In Count II plaintiff alleges that HHS violated his constitutional right to procedural due process as a result of its alleged arbitrary and capricious actions in failing to grant a veterans' preference. In Count III, plaintiff contends that the alleged arbitrary and capricious acts

also violated his constitutional right to equal protection and due process. As relief for the alleged violations plaintiff seeks a declaration that he is entitled to the position for which he was not selected together with back pay and all other benefits which would have accrued to him had he been selected.

In Count IV, plaintiff asserts a Freedom of Information Act claim, pursuant to 5 U.S.C. § 552, as amended, for certain documents related to the personnel action. Finally, in Count V of the amended complaint, plaintiff asserts a claim for violations of the First Amendment.

Inasmuch as Counts I, II, III and V seek relief under various theories for defendant's decision to deny plaintiff the position of Regional Attorney, the court will review those counts collectively. Then the court will review plaintiff's allegations as stated in Count IV.

MOTION TO DISMISS COUNTS I, II, III, AND V

Defendant contends that an application of *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983), requires that the complaint be dismissed for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12(b) (6). The court should deny a motion to dismiss for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). Generally, the allegations of a complaint are to be liberally construed. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981). However, if it is clear from the complaint that plaintiff could prove no set of facts that would entitle him to relief, the complaint should be dismissed. *Madison v. United States*, 752 F.2d 607 (11th Cir. 1985).

Plaintiff claims that upon being improperly denied the position of Regional Attorney, Region IV, he filed a complaint with the Office of Special Counsel (OSC). The record indicates the OSC conducted a review of plaintiff's filing and rejected the

grievance on the ground that non-selection for promotion from a group of properly ranked certified candidates is excluded from grievance coverage. (See Exhibit A of "Plaintiff's Response to Defendant's Motion to Dismiss Count V.) The OSC declined to refer plaintiff's complaint to the Merit System Protection Board (MSPB).

Plaintiff argues that because of such denials he is entitled to relief under the Administrative Procedures Act (APA). The APA's comprehensive provisions, set forth in 5 U.S.C. §§ 701-706, allow any person adversely affected or aggrieved by agency action to obtain judicial review thereof, so long as the decision challenged represents a final agency action for which there is no other adequate remedy in a court. *Webster v. Doe*, 56 U.S.L.W. 4568, 4569-70 (U.S. June 15, 1988). Section 701(a), however, by its own terms, limits application of the APA.

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a) (1), (2); *Webster*, 56 U.S.L.W. at 4570.

Section 701 (a) (1) is concerned with whether Congress expressed an intent to prohibit judicial review; subsection (a) (2) applies in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply. *Webster*, 56 U.S.L.W. at 4570. In deciding whether subsection (a) (2) precludes application of the APA in this case, the court must determine whether the Civil Service Reform Act (CSRA) is drawn in such broad terms that there is no law to apply.

The Supreme Court has recognized that the CSRA comprehensively overhauled the civil service system in creating an elaborate new framework for evaluating adverse personnel actions against federal employees. *U.S. v. Fausto*, ___ U.S. ___, 108 S.Ct.

668, 671 (1988) quoting *Lindahl v. OPM*, 470 U.S. 768, 773-74, 105 S.Ct. 1620, 1624-24, 84 L.Ed.2d 674 (1985). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *U.S. v. Fausto*, ___ U.S. at ___, 108 S.Ct. at 671. Therefore, this court determines that the CSRA is not drawn in such broad terms that there is no law to apply. Accordingly, agency action is committed to agency discretion by law and application of the APA is not permitted, pursuant to 5 U.S.C. § 701 (a) (2).

The court determines that a ruling on whether judicial review under the APA is also precluded by statute, pursuant to § 701 (a) (1) requires a review of *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) and the line of cases following this decision.

As in *Bush*, plaintiff in the instant case is employed within the CSRA, which establishes standards and provides authority for the government to take actions necessary to ensure adequate employee performance and conduct. *See Harrison v. Bowen*, 815 F.2d 1505, 1509 (D.C. Cir. 1987). The CSRA provides a remedial scheme through which employees may vindicate the substantive rights provided by CSRA. The remedial scheme provides, in relevant part, as follows:

> (1) for major personnel actions specified in the statute ("adverse actions"), direct judicial review after extensive prior administrative proceedings;
>
> (2) for specified minor personnel actions infected by particularly heinous motivations or disregard of law ("prohibited personnel practices"), review by the Office of Special Counsel, with judicial scrutiny "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry" (citation omitted); and

(3) for the specified minor actions not so infected, and for all other minor personnel actions, review by neither OSC nor the courts.

Carducci v. Regan, 714 F.2d 171, 175 (D.C. Cir. 1983); CSRA, § 1 *et. seq.*, 92 Stat. 1111. An "adverse action" under item one above would include removal, suspension for more than 14 days, reduction in pay or grade, and a furlough of 30 days or less, pursuant to 5 U.S.C. § 7512. Plaintiff claims that he was improperly denied a promotion and does not contend that the actions of the defendant in this case are included in the definition of "adverse action." "Prohibited personnel practices" as referenced in item two above is defined at 5 U.S.C. § 2302 as including:

(1) discriminat[ion] for or against any employee or applicant for employment —

(B) on the basis of age . . .;

(2) solicit[ation] or consider[ation of] any recommendation or statement . . . with respect to any individual who . . . is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records or the person furnishing it . . .;

(6) grant[ing] any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition for the requirements of any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(10) discriminat[ion] for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others;

(11) tak[ing] or fail[ing] to take any other personnel action if the taking of or failure to take such action vio-

> lates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title . . .

5 U.S.C. § 2302(b). Specifically, plaintiff alleges that the defendants, among other things, failed to seek comments from plaintiff's past supervisor, improperly considered criteria outside the selection criteria, failed to give appropriate weight to plaintiff's experience, failed to give plaintiff a veterans preference and as a result improperly denied plaintiff the position of Chief Counsel, Region IV, Atlanta, Georgia. As these allegations are clearly within the above definition of a "prohibited personnel practice," plaintiff's remedy is as set forth in the second provision, that is, he must seek review by the Office of Special Counsel.

In this situation, judicial scrutiny is "limited to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry." The record before the court indicates that the OSC made sufficient inquiry into plaintiff's claims as evidenced the previously mentioned OSC letter of March 25, 1987. That office found that there was "insufficient evidence of any prohibited personnel practices or other violations of law, rule, or regulation within our investigative jurisdiction. Specifically, neither the Office of Personnel Management nor your agency mandate that positions in the excepted service be filled using competitive service merit promotion regulations. The numerous regulations which you contend were violated by the agency under its own Merit Promotion Plan and OPM regulations are not strictly binding . . ." The court is not aware of any provision which makes it mandatory that the OSC refer plaintiff's grievance to the MSPB or that permits judicial review of decisions of the OSC. Although it appears that the CSRA provides exclusive relief, plaintiff seeks judicial review of the agency's decisions in this action.

The Supreme Court directed the judiciary to "pay particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush*, 462 U.S. at 378, 103 S.Ct. at 2411. The Supreme Court found that the unique

nature of the federal personnel system was a special factor which counsels such hesitation. 462 U.S. at 372, 103 S.Ct. at 2408. The court further stated that:

> The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step-by-step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

Bush, Id. at 388, 103 S.Ct. at 2416-17. The Supreme Court answered this question in the negative. The Court found that the judiciary should not create such new remedies when Congress has constructed a comprehensive remedial system for redress.

Plaintiff contends that the remedy provided in this case is so limited that it results in the absence of meaningful remedies being provided under CSRA. Although plaintiff believes his remedy is inadequate under the system, the Court expressly recognized that "civil service remedies were not as effective as an individual damages remedy and did not fully compensate [a plaintiff] for the harm suffered." *Id.* at 372, 103 S.Ct. at 2408.

The Court's decision that the judiciary should not create new remedies is premised upon the conclusion that Congress was in a better position than the courts to decide whether particular remedies should be available to federal employees with respect to wrongs allegedly suffered in connection with personnel actions. *Id.* at 389, 103 S.Ct. at 2417. In essence, the Supreme Court deferred to Congress, pointing out that the policy judgment involved should be an informed one and that Congress was much better equipped than the courts to inform itself about the respective costs and benefits affecting the public interest in an efficient civil service. *Id.* at 388-89, 103 S.Ct. at 2417. *See also McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), *cert. denied sub nom. McCollum v. Tisch*, __ U.S. __ , 107 S.Ct. 883 (1987); *Hallock v. Moses*, 731 F.2d 754, 757 (11th Cir. 1984). In this case, Congress

has provided the remedy to which it determined an individual would be entitled when there is a prohibited personnel practice.

The Eleventh Circuit has refused to find that a disparity in remedies should result in one federal employee having a civil damages remedy, where another with a more serious claim is barred from such a remedy. "We should never suppose that in providing more effective remedies for some grievances than for others, the Congress intended that those grievants who were left in the second group were really meant to be better off than those in the first." *Wells v. F.A.A.*, 755 F.2d 804, 810 (11th Cir. 1985). Plaintiff's arguments have been consistently rejected by the Eleventh Circuit Court of Appeals. *See Wells v. F.A.A.*, 755 F.2d at 810. *See also McCollum v. Bolger*, 794 F.2d at 607; *Hallock v. Moses*, 731 F.2d at 757. The court notes that plaintiff has failed to adequately distinguish these cases or present any plausible argument as to why this court should not follow the strong precedent that has been established in this circuit.

The fact that plaintiff has alleged constitutional violations does not take his claims outside the remedial provisions of the CSRA. The Supreme Court recognized that "[c]onstitutional challenges to agency action . . . are fully cognizable within [the CSRA]." *Bush v. Lucas*, 462 U.S. at 386, 103 S.Ct. at 2415. Moreover, the analysis in *Bush* applies regardless of the constitutional right alleged to have been violated. *Wells v. F.A.A.*, 755 F.2d at 809; *Dynes v. Army Air Force Exchange Service*, 720 F.2d 1495, 1498 (11th Cir. 1983).

Furthermore, the Supreme Court has held that when an individual is employed within the framework of the CSRA, even where Congress has failed to provide any right of judicial review under the CSRA, such individual is not free to pursue "whatever judicial remedies he would have had before enactment of the CSRA." *United States v. Fausto*, __ U.S. at __ , 108 S.Ct. at 673. Based on *Fausto*, even if plaintiff, employed as a CSRA employee, was provided no remedy under CSRA, he would not be

entitled to judicial review for the type of personnel related issues set forth herein.

When the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, the Court has not created additional remedies. *Schweiker v. Chilicky*, 56 U.S.L.W. 4767, 4770 (U.S. June 24, 1988). The CSRA clearly sets forth the remedy to which Congress considered adequate for prohibited personnel practices in the CSRA. This design leaves no doubt that Congress believed it was providing an adequate remedy for prohibited personnel practices. Moreover, *Fausto* and *Chilicky*, in addition to the strong precedent in this Circuit, leave little doubt that courts are precluded from fashioning a judicial remedy based upon a perception that the remedy provided by Congress is inadequate.

In the instant case, plaintiff's claims arise "out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," therefore, this court should not supplement that "regulatory scheme" with a further, judicially-created damages remedy. *See Bush v. Lucas*, 462 U.S. at 368, 103 S.Ct. at 2306; *McCollum v. Bolger*, 794 F.2d at 607; *Wells v. F.A.A.*, 755 F.2d at 809-10; *Hallock v. Moses*, 731 F.2d at 757. The recent Supreme Court cases of *Fausto* and *Chilicky* clearly demonstrate that Congress' decision not to provide a mechanism by which employees such as plaintiff may obtain judicial review of agency employment decisions is not an uninformative consequence of the limited scope of the statute, but rather a manifestation of a considered congressional judgment that they should not be subject to such review. *United States v. Fausto*, __ U.S. at __, 108 S.Ct. at 673-74.

In view of the foregoing, the court concludes that judicial review is precluded by the CSRA and that, pursuant to 701 (1) (1), plaintiff may not seek review under the APA. Plaintiff is not entitled to relief on Counts I, II, III and V as Congress has provided

comprehensive procedural and substantive provisions which give meaningful remedies against the United States by way of the CSRA. Such relief is unavailable as a matter of law.

In addition to reasons set forth in the above discussion, the court further determines that even absent the comprehensive scheme of the CSRA, plaintiff's claim for a veterans' preference must fail. Employees seeking a different position within the agency are not entitled to a veterans' preference when the position sought would constitute an internal agency promotion.

> When the Veterans' Preference Act was passed, it was explained to Congress that it provided a preference both in *appointment* to and *retention* in Federal positions. *See Hilton v. Sullivan*, 334 U.S. 323, 338 n.14, 68 S.Ct 1020, 92 L.Ed. 1416 (1948). With the sole exceptions of additional credits for military service provided examinees by Section 4 of the Act, 5 U.S.C. § 3363, neither the Act nor the CSC regulations promulgated thereunder accord veterans preferential treatment in promotions.

Crowley v. United States, 327 F.2d 1176, 1183 (Ct.C1. 1975). A veteran is entitled to preference over non-veterans only in connection with an initial appointment to the federal service or in connection with a reduction-in-force among personnel in the same competitive level. *Qualls v. United States*, 678 F.2d 190, 196-97 (Ct.C1. 1982). As plaintiff was not an initial appointment and there was no reduction-in-force at issue in this case, plaintiff was not entitled to a veterans' preference.

Upon review, the court determines that there is no set of facts that would entitle plaintiff to relief. Accordingly, for the reasons set forth above, the court concludes that Counts I, II, III and V must be DISMISSED for failure state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P.12 (b) (6).

MOTION FOR SUMMARY JUDGMENT ON COUNT IV

Count IV alleges a Freedom of Information Act (FOIA) claim, pursuant to 5 U.S.C. § 552, as amended. Plaintiff alleges that he requested and was entitled to certain documents which relate to the personnel decision at issue and which defendant declined to produce. The undisputed facts in this case are as follows: Plaintiff seeks records which consist of applications, notes of interviews, evaluations and memos on all candidates for the position of Regional Attorney, in addition to records on rating, ranking and grouping of candidates, scoring matrices and background checks and reference checks on candidates from Regional Directors and other persons shown as references. Plaintiff made his request for such documents under the FOIA. Defendant asserted various privileges, primarily under 5 U.S.C. § 552 (b) (5), (6), and refused to produce all above-referenced documents to plaintiff. Defendant produced the records which related to plaintiff and the successful applicant.

Defendant moved for summary judgment, stating that plaintiff is not entitled to the documents sought either because they fall within an exemption to the FOIA or plaintiff has failed to exhaust administrative remedies. Summary judgment is only proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Warrior Tombigbee Transporation Co., Inc. v. M/V NAN FUNG*, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed.R.Civ.P. 56(c). The court must review the evidence and all factual inferences from that evidence in the light most favorable to the party opposing the motion. *Sweat v. Miller Brewing Co.*, 708 F.2d 655, 656 (11th Cir. 1983).

The burden is upon the government to furnish evidence to rebut the presumption of disclosure. *Ely v. F.B.I.*, 781 F.2d 1487, 1488 (11th Cir. 1986). The trial court must determine that the trial court had an actual factual basis to support a claim of privilege. *Id.* at 1491. This determination may be based on an in-camera inspection, hearing or an affidavit. *Id.* at 1494.

Defendant relies on 5 U.S.C. § 552 (b) as the basis for asserting the privileges in this case. That section provides, in relevant part, as follows:

> (b) This section does not apply to matters that are—
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which constitute a clearly unwarranted invasion of personal privacy; . . .

5 U.S.C. § 552 (b) (5), (6).

The government shows by way of declaration made under penalty of perjury that the applications, other than those of the plaintiff and the successful applicant, are being withheld because disclosure would effect an unwarranted invasion of the personal privacy. The government included a blank copy of the application for review by the court. The review disclosed that the applications were very detailed and the information contained therein would be highly personal. The date requested included names, home addresses, education, training, employment histories, experience, marital status, legal arrest information, etc. Plaintiff was provided a copy of his application in addition to that of the successful applicant (with some deletions). The applications of the remaining candidates were withheld. Inasmuch as plaintiff has not shown that there is a strong public interest in the disclosure of this personal information, the court determines that such applications may properly be withheld pursuant to 5 U.S.C. § 552 (b) (6).

The government also included a copy of a scoring matrix which was withheld. The government shows that the matrix was prepared by the Associate General Counsel to assist the Acting General Counsel in making a selection for the position. The matrix listed categories which were assigned a numerical value reflecting

the recommendation or opinion of the evaluator for each candidate in each area. The categories included experience in subject matter areas, capability as a lawyer, management ability, maturity, creativity, commitment to agency, etc. Plaintiff was provided the portions of the matrix which evaluated the successful applicant and his personal evaluation. The court finds that plaintiff has been provided the information most relevant to his non-selection. The court further finds that the matrix represents subjective opinions and recommendations which were submitted as a part of the deliberations of the selection process. Therefore, the remaining portions of the matrix may properly be withheld under the deliberative process privilege or pursuant to 5 U.S.C. § 552 (b) (5) or (6).

Plaintiff also seeks the disclosure of various interview summaries, groupings, ratings, rankings, documented remarks and personal notes, all of which were made during and pertain to the selection process contested by plaintiff. For the reasons set forth in the preceding paragraph, the court determines that such information may be properly withheld on all candidates other than the successful candidate and the plaintiff in the instant action. The court notes that plaintiff has not shown that a public interest exists. The court determines that based on the record in this case, such an interest would be minor in relation to the unwarranted invasion of personal privacy that would result.

The performance evaluations of Mr. Carl Harper, the former Regional Attorney were also withheld by the government. Upon review, the court determines that such records would contain personal information regarding Mr. Harper's abilities and job performance, as well as other personal data. Absent a showing of some public interest, the court finds that the evaluations were properly withheld pursuant to 5 U.S.C. § 552 (b) (6), as an unwarranted invasion of privacy.

It appears to the court that the existence of all documents at issue has been disclosed and reviewed by the court in the above discussion. The government has met its burden of showing that the information in question is covered by one of the exceptions to

disclosure. *See Ely v. F.B.I.*, 781 F.2d at 1487. In view of the foregoing, the court determines that there are no genuine issues of material fact and that defendant is entitled to summary judgment on Count IV of the complaint as a matter of law. Accordingly, defendant's motion for summary judgment on Count IV is GRANTED.

In summary, defendant's motions to dismiss Counts I, II, III of the original complaint and Count V of the amended complant are GRANTED. Defendant's motion for summary judgment as to Count IV is GRANTED, thereby disposing of all pending claims in this action. This action is hereby DISMISSED.

SO ORDERED, this 4th day of April, 1989.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE